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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-sixth session

SUMMARY RECORD OF THE 23rd MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 17 August 1994, at 3 p.m.

Chairman: Mrs. ATTAH

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The meeting was called to order at 3.15 p.m.

IMPLICATIONS OF HUMANITARIAN ACTIVITIES FOR THE ENJOYMENT OF HUMAN RIGHTS (agenda item 20) (continued) (E/CN.4/Sub.2/1994/39)

1. Ms. Parker (International Educational Development, Inc.) said that her organization, which had a Humanitarian Law Project, welcomed the work done by Mrs. Palley, both in her initial preparatory document (E/CN.4/Sub.2/1993/39) and in her further preparatory document currently before the Sub-Commission (E/CN.4/Sub.2/1994/39). It was seriously disappointed at the action taken by the Commission on the issue, particularly since the Government of the United States of America, a key participant in debates on "humanitarian activities" and a key player in the provision of either real or so-called humanitarian assistance, had led the campaign against the study.

2. The United States Government had made a misguided attempt to stifle serious work and debate on various vital issues submitted to the Commission by the Sub-Commission, and it was saddening that other Governments had gone along with it. The United States action was particularly unfortunate because the Sub-Commission had rarely had the requisite expertise, available in Mrs. Palley, to undertake a study of the issue. Her organization therefore strongly urged the Sub-Commission to insist to the Commission that the study should be undertaken. On the assumption that that would be the case, it wished to bring some of its concerns to Mrs. Palley's attention.

3. In some past situations, the United Nations had become involved but had then faded away before a permanent solution to the crisis had been found. It was important that the future special rapporteur should evaluate the reasons behind the failures of those efforts, especially because, in some cases, the original problems were continuing and, in fact, worsening. A prominent example had been the situations in Maluku and Acheh at the time of the transfer of sovereignty from the Netherlands to what had become Indonesia.

4. The United Nations was currently playing a larger role in Guatemala since the Unidad Revolucionaria Nacional Guatemalteca (URNG) and the army and Government of Guatemala had signed various accords. The 17 July Agreement dealt with the resettlement of the more than 1.5 million persons who were either outside Guatemala or had been internally displaced because of the armed conflict. UNHCR had a major role to play in the resettlement effort, but it was already severely overburdened by the worldwide refugee crisis. The special rapporteur should consider how the international community as a whole should improve support for UNHCR. Also in Guatemala, URNG was urging the establishment of a verification commission, to be monitored by the United Nations, which could play an important role both in re-establishing a regime of full respect for human rights and as a mechanism for bringing to light past violations so that the perpetrators could be brought to justice. Clearly the risk of impunity, as raised in Mrs. Palley's preparatory documents, loomed large.

5. While the situation in Kashmir echoed that of Maluku and Acheh in the failure to carry out initial United Nations directives, a "peace-keeping" action was continuing there. However, the United Nations forces had no human rights or humanitarian mandate. Even so, thousands of complaints of

violations of human rights and humanitarian law were handed over to the United Nations forces by victims and observers. She wondered what happened to them. Every peace-keeping effort should have a human rights mandate, with clear reporting and action plans. Perhaps the High Commissioner for Human Rights should have an ongoing mandate to coordinate human rights activities in all peace-keeping efforts.

6. The situations in Croatia and Bosnia and Herzegovina raised many questions relating to humanitarian action and human rights. One that had not yet been fully addressed was the implications for self-determination and the sovereign equality of States when the United Nations involved itself in a process under which the States in question were coerced into a new form of State having "restricted sovereignty" over part of its acknowledged territory. In her organization's view, the idea of "restricted sovereignty" and the negotiations with mainly Serb leaders actually functioned as a reward for war crimes.

7. Mrs. Palley should also concern herself with double standards. For example, there had been a political decision to use the situation of the Kurdish people in Iraq as a pretext for a massive military attack on Iraq and the establishment of a United Nations safety zone. At the same time, the main country involved continued to provide huge sums and military material to Turkey to assist that country in its use of military force against Kurdish people in Turkey having aspirations similar to those of the Kurdish people in Iraq. Turkey, incidentally, was also failing to comply with numerous United Nations resolutions regarding Cyprus.

8. In paragraph 32 of her further preparatory document, Mrs. Palley referred to a so-called hiatus when there was a suspension of human rights by a State owing to an internal emergency but the State in question did not apply protection under humanitarian law because it did not recognize that an armed conflict was in existence. In her organization's opinion, there was no hiatus: humanitarian law applied whether or not a State recognized it. It applied when, objectively, there was an armed conflict. Unfortunately, in no recent internal armed conflict had any State actually recognized humanitarian law unless forced to do so by the international community. States preferred to invoke "terrorism", as if that allowed them to ignore humanitarian law. It was time to put an end to that abuse and to remind all States that, where there was an internal armed conflict, humanitarian rules automatically applied.

9. To reinforce that point and to provide an answer to the question as to whether or not United Nations forces had obligations under the Geneva Conventions, she wished to draw the Sub-Commission's, and the future special rapporteur's, attention to the 1986 case of Nicaragua v. United States of America, in which the International Court of Justice had categorically stated that article 3 common to the Geneva Conventions was the minimum yardstick for all forces, all peoples, at all times, regardless of whether a country had ratified any particular instruments of humanitarian law or was actually involved in a conflict. The United Nations system was currently lacking both coherence and vision. The proposed study was badly needed as

part of a process to bring understanding and uniformity, as well as the full integration of human rights and humanitarian standards, into all United Nations operations.

10. Mr. NEWMAN (Human Rights Advocates) said he wished to focus on paragraph 34 of Mrs. Palley's further preparatory document, where it was stated that "The question is whether the [Security] Council must always have regard to the basic principles of international humanitarian law and to human rights law ...". The answer given by his organization was in the affirmative, and it believed that the same answer applied also to all United Nations bodies and their personnel, including those engaged in humanitarian work. By way of illustration reference could be made to the proviso that "No one shall be subjected to ... cruel, inhuman or degrading treatment ..." which appeared in both article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights.

11. Under article 4 of the Covenant, no derogation from that norm was permitted, even in times of armed conflict which threatened the life of a nation. Article 29, paragraph 2, of the Universal Declaration of Human Rights, however, did allow derogations that were deemed essential to meet "the just requirements of morality, public order and the general welfare in a democratic society". Those words created an enormous black hole and, consequently, the drafters of the International Covenant on Civil and Political Rights had rejected article 29, paragraph 2, of the Universal Declaration of Human Rights. The question then arose as to which of those two provisions applied to humanitarian activities. In his organization's opinion, the rule given in the Covenant should govern all States that were parties to it, all United Nations bodies, and all officials everywhere, because of the requirements of jus cogens and customary international law.

12. All that meant that, in the various stages of the proposed study it would be essential to separate human rights law from the many human rights documents that had been either superseded or, in part, amended. Article 7 of the International Covenant on Civil and Political Rights in fact amended articles 5 and 29 of the Universal Declaration of Human Rights. Similarly, disabled persons could benefit immensely from United Nations treaty law, even though the General Assembly's new standard rules for the equalization of opportunities for them were hortatory only and did not create human rights law. Those new rules were, however, directly related to justice, and, Article 2, paragraph 3, of the United Nations Charter required all Governments to settle their international disputes "in such a manner that international peace and security, and justice, are not endangered". That requirement of the Charter had a challenging import for proposals concerning all forms of humanitarian activity.

13. Lastly, his organization strongly supported Mrs. Palley's conclusion (para. 3) that the Sub-Commission was the appropriate venue for initiating and developing such a study. Indeed, it considered that the Sub-Commission should also help to coordinate the necessary and constant attention that must be given to the appropriate monitoring of the immense impact on human rights of almost all activities that the international community described as "humanitarian".

14. Mr. EYA-NCHAMA (International Movement for Fraternal Union among Races and Peoples) said his organization strongly supported Mrs. Palley's preliminary report and asked the Government of the United States of America not to place obstacles in the way of the preparation of a study.

15. Military intervention, described as "humanitarian", was reminiscent of the colonial conquests of the nineteenth century, made under the cover of bringing civilization to savage peoples. Such humanitarian intervention was carried out in three stages. The first stage was to support illegitimate Governments with a power of life or death over persons. When the persons concerned rebelled, military agreements were invoked and an army sent to support the illegitimate Government.

16. If the rebels were well organized, the need to protect Western nationals and persons connected with the illegitimate Government was then invoked - the second stage, leading to discrimination in the protection of human rights, since most nationals of the country in which the conflict was taking place were abandoned to their fate. Curiously enough, most of the cases in which the need to protect Western nationals had been invoked related to Africa. It had not happened in connection with the conflicts in Georgia, the Mexican State of Chiapas, or Bosnia and Herzegovina.

17. The third stage was to allow one or two months to elapse after the Western nationals had been evacuated, so that the situation could deteriorate. Once that had occurred, military intervention was organized under the cover of humanitarian assistance, backed by an orchestrated campaign in the international press, for the purpose of protecting colonial, strategic, commercial and political interests.

18. The Security Council had become an instrument for covering up military intervention under the cloak of humanitarian assistance. The future report should therefore clearly establish when the Security Council should intervene to protect the human rights and fundamental freedoms of all people without any discrimination. Also, a mechanism to prevent serious and persistent violations of human rights that might lead to international conflicts should be set up at the world level.

19. There was currently a conflict involving the Tuaregs in Mali and Niger, but no international body had tried to resolve it. However, the day that the conflict became very serious, military intervention would be arranged under the cover of humanitarian assistance.

20. To prevent conflicts, a permanent commission consisting of the High Commissioner for Human Rights, the Security Council and the International Court of Justice should be established to analyse the human rights, political and legal aspects of international humanitarian assistance, avoiding any confusion between humanitarian interests and the interests of the major Powers.

21. Mrs. PALLEY thanked her colleagues and the NGOs for the invaluable comments they had made, which would all be taken fully into account if she was requested to proceed with the study. The core of her proposed study would be the question as to how the Charter should be interpreted in relation to the

concept of humanitarian assistance and intervention and human rights. An examination of the doctrine of implied powers, mentioned by Mr. Yokota, would be included. Her intention was to set out fully the various competing and complex arguments and their implications in a balanced fashion, without reaching any conclusions until she had thoroughly researched the issues and without any bias.

22. All Mr. Khalifa's points had been duly noted, especially the one on sovereignty as the basis of the United Nations. Mr. Chernichenko had rightly pointed out the delicacy of the subject-matter of the proposed study. If entrusted with it, she would consult him about the human rights aspects of international law. She accepted the important points made about implied collective agreements and the danger of an extended doctrine of self-defence, especially the danger of making too broad a use of Article 51 of the Charter, which would represent a return to nineteenth-century concepts of intervention and, as one NGO had just pointed out, would add to it the problem of discrimination in favour of foreigners.

23. She accepted the points made by Mr. Bossuyt, including those relating to the absolute necessity for adequate host State agreements in respect of all United Nations forces, the modification of the rules of engagement for United Nations forces, and the need for them to be adequately equipped if they had to cope with emergencies and other difficulties. The current debate in the Sub-Commission could be very useful for other bodies considering problems afflicting the United Nations.

24. Mr. Khan had rightly drawn attention to the absence of discussion, until very recently, of humanitarian intervention. The reason was that the doctrine had apparently disappeared, but it had since been resurrected. From 1990 onwards, beginning with a discussion on humanitarian assistance in national emergencies and disasters, the concept had been expanded to cover collective defence as a justification for States to act against other States and also cases of intervention in Member States sometimes described as "humanitarian assistance".

25. In her own view, the only recent case in which proper use had been made of humanitarian assistance was in connection with the establishment of Bangladesh and, even in that case, there were arguments on both sides. Consequently, there was a need to make a clear distinction between humanitarian assistance and humanitarian intervention.

26. Mr. Fan had drawn attention to the role played by the International Committee of the Red Cross (ICRC) in the protection of humanitarian law. Unfortunately, however, ICRC had no supervisory role, nor would it wish to assume one, since it was a neutral, impartial and independent body that looked after combatants on both sides. If consulted, ICRC officials would almost certainly say that a great deal of damage had been done to their work by certain recent practices that had developed within parts of the United Nations system.

27. It would surely not be right to postpone the study for yet another year on the grounds that ICRC should first be asked for its views. In any case, if entrusted with the study, she would request permission to make use of ICRC's

library and other facilities and would consult ICRC officials. Nor should the fact that States were to meet under some very good ICRC initiatives to discuss humanitarian law serve as a deterrent to making the study. If those initiatives bore fruit, she would have less work to do, because the outcome would be reflected in the proposed study. The latter, however, would cover an area much broader than humanitarian law, since an effort would be made to show the linkage between all the various parts of the United Nations system with regard to human rights and humanitarian assistance.

28. She thanked Mr. Lindgren Alves, who had rightly pointed out that one of the main purposes of the proposed study was to pave the way for a coherent development of international human rights law. She fully agreed with him that the word "protection" was more appropriate than the word "enforcement" under the United Nations Charter. In any case, she would have to investigate whether there was, under the Charter, any such concept as "human rights enforcement".

29. Ms. Chavez had expressed concern that the proposed study might not be completed. Even if it was not completed in three years' time, it would be for the Sub-Commission to decide whether it wished to appoint a new special rapporteur to develop the work further. She herself would try to give a broad overview and then to concentrate on certain areas within it.

30. Mr. Joinet had emphasized the need for clear definitions. That would certainly be taken into account in her proposed study, since certain terms like "humanitarian intervention" and "human rights enforcement" had been used ambiguously.

31. The question arose as to why the International Law Commission (ILC) should not do the work. In her opinion, the ILC was not the appropriate body to undertake a study of that kind. She had a great admiration for the ILC, which did superb academic work in highly specialist areas. However, it did its work so meticulously and at such a great length that it would take 20 years to complete a study of the kind proposed. Moreover, the ILC was a codifying body and the proposed study would be of a general nature and take a broad view. She hoped, however, that, when the proposed study was taken up at higher levels, the Sixth Committee of the General Assembly would refer certain matters within it to the ILC.

32. She thanked Mr. Alfonso Martinez for his stimulating comments. She would like to clarify that what she had wanted to say was that it was not the duty of the Security Council to solve those international humanitarian questions, but that it was its duty to cooperate in solving those problems and she was sure that Mr. Alfonso Martinez would agree with that interpretation. She had indeed said that the Security Council was concerned; a different question was, however, whether it had the power. The meaning of the word "assumption" could be ambiguous; it meant taking power but implied nothing about the legality of such action. In all the examples she had quoted, power had been assumed and there had also been agreement by the relevant States or, alternatively, the Security Council clearly had power in the matter, as in the case of Namibia. She would not deal with cases where there had not been consent. The action to

which she had referred in paragraph 18 of her further preparatory document must, of course, be taken in accordance with legal principles. No organ of the United Nations could act counter to the Charter.

33. Concerning his point regarding the International Court of Justice, she thought that neither the judgements of the Court nor decisions of the Security Council or General Assembly could be conclusive on the issue. A very interesting question, also referred to by Mr. Khan, related to the interpretation of Article 24 of the Charter. That was a difficult question; there had been divided opinions and differences of interpretation and practice. She did not think that anyone had paid much attention to Article 60, to which Mr. Alfonso Martinez had referred. Her mind was open on that question and she would set out all arguments on either side.

34. She also thanked Ms. Daes for her comments. She herself was aware of the implications of human rights activities for United Nations personnel and would certainly bear the issue in mind. She proposed to analyse at length the concept of humanitarian intervention and its legality or otherwise.

35. She welcomed the very helpful comments of Mr. Khan on Article 27 of the Charter and on what was essentially within the domestic jurisdiction of States. Those questions would certainly be examined at length in conjunction with the relationship to Article 24.

36. She agreed that it would not be desirable for any call for amendments of the Charter to come from the Sub-Commission; it was a totally inappropriate body to make such a call. There was, however, a General Assembly committee which was looking at the Charter and also an Article in the Charter itself which dealt with the possibility that, at some future date, an international conference might be convened to look at the issue of amending the Charter. What a study could do however was indicate that, if certain functions and tasks were to be exercised or assumed in the field of human rights and humanitarian assistance, a Charter amendment might represent the best mechanism. Reference might also be made to the composition of the Security Council because, if human rights interests were a function of the Security Council, that body must surely have a composition different from that which it had been given when it was established, at a time when human rights had not been regarded as a major component of its activities. It was, however, up to the appropriate bodies to consider the issue. Similarly, functions enjoyed by other organs had implications for their membership and raised the possibility that membership might have to be more democratic.

37. She wished to assure Mr. El-Hajje that her report had not been based on the assumption that the situation in the world would deteriorate; even if it continued as it was or, indeed, improved, the proposed study might still be useful. The need for the study had been precipitated by the assumption in practice of certain powers in recent years and the questions which had arisen regarding the legality of those powers. She agreed with his comments on paragraph 35 of her further preparatory document and quite understood his difficulties with it. The Sub-Commission was, however, a think-tank and it was important that new ideas should be considered. He had also asked why

there had to be a fresh interpretation when innumerable volumes and articles on the topic already existed. The answer was that interpretation never ceased; life was all about interpretation and reinterpretation.

38. The American Association of Jurists had expressed concern about the delegation of power by many United Nations bodies to individual States to act in ways which had an adverse impact on human rights. That had, indeed, been one of her concerns.

39. She welcomed the comments of International Educational Development Inc. which she would certainly take into account. In her view, it was the duty of human rights peace-keeping bodies which came across human rights violations or received communications to pass the information on to the appropriate bodies. She did not agree entirely with what it had said about deficiencies in the linkages between humanitarian and human rights law. There was a vast grey area there which needed to be clarified. Nor was she convinced that article 3 of the Geneva Convention provided sufficient protection. If it did, she wondered why two additional protocols had been needed and why people were still asking for protection.

40. She appreciated the comment of Human Rights Advocates to the effect that the Sub-Commission was the appropriate body to coordinate and monitor the immense network of activities which had been labelled humanitarian by the International Law Commission.

41. In conclusion, she wished to thank all those speakers whom she had not mentioned but who had offered comments; those would certainly be taken into account. She would also like to extend her particular thanks to Ms. Warzazi, without whom her preparatory documents could not have been written.

42. The CHAIRMAN said that the Sub-Commission had concluded its general debate on agenda item 20.

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED (agenda item 4) (continued) (E/CN.4/Sub.2/1994/4-6, 7 and Add.1, 8, 9, 10 and Add.1 and 11; E/CN.4/Sub.2/1994/NGO/4 and 24)

43. Mrs. KSENTINI, Special Rapporteur on human rights and the environment, introducing her final report (E/CN.4/Sub.2/1994/9), said that the mandate for the report was set out in paragraphs 8 to 19; chapter I was devoted to the legal foundations of the right to the environment; chapter II addressed the specific relationship between development and the environment; chapter III concerned other aspects of the relationship between human rights and the environment; chapters IV and V analysed the impact of the environment on vulnerable groups and on the enjoyment of fundamental rights and chapter VI contained her conclusions and recommendations. The annexes contained a draft declaration of principles on human rights and the environment, an overview of consultations with non-governmental organizations and a summary of national legislation and practices, compiled essentially on the basis of replies from Governments.

44. Environmental protection was not just a modern concern; the moral principle was to be found in the precepts of Islam in, for example, the

exhortation of the first Caliph to the commander of the Arab armies to respect palm trees, fields of wheat, fruit trees and cattle. International environmental regulations, which had emerged from a worldwide movement and a collective realization of the dangers threatening the planet and the future of mankind, had initially been sectoral and essentially envisaged within the traditional framework of inter-State relations; they had finally attained a global dimension which had made possible the shift from environmental law to the right to a healthy and decent environment. The 1972 United Nations Conference on the Human Environment had represented a qualitative leap. In paragraph 25 of the report, she had defined the range of relevant principles which might be considered as binding upon States.

45. International human rights instruments contained some specific provisions relating to the environment. Paragraphs 34 to 46 of the report contained comments on some of those instruments.

46. Chapter II was of fundamental importance as it illustrated the linkage between poverty, underdevelopment, environmental degradation and the enjoyment of human rights. The theme was developed in section A of the chapter. Data on the extent of poverty in the world had been provided in paragraph 53. It was widely recognized and acknowledged that poverty and underdevelopment had an adverse effect that caused serious damage to the environment and everywhere impeded realization of the right to development and of other fundamental rights of the individual and of peoples.

47. In paragraphs 55 to 62, she had attempted to illustrate how the structure of international relations, and more particularly the burden of debt and the impact of structural adjustment measures on the least favoured sectors of the population, might constitute serious impediments to the achievement of sustainable development.

48. In chapter II, section B, she emphasized the need to bear in mind that General Assembly resolution 44/228 stressed that the major cause of the deterioration of the environment was the pattern of production and consumption, particularly in the industrialized countries, and that the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage. It had also recognized that new and additional financial resources would have to be channelled to developing countries in order to ensure their full participation in global efforts for environmental protection without introducing new forms of conditionality. She had also referred to the features which had seemed to her to underlie the consensual approach to environmental problems.

49. In chapter III, section A, she dealt in some detail with the issue of indigenous peoples and the environment. In paragraphs 76 to 92 she had tried to provide a state-of-the-art report on that issue. Nevertheless, in spite of some encouraging events, she was aware that existing efforts to protect indigenous peoples' rights and their fragile habitat had so far been inadequate. In particular, alternatives to large-scale development schemes must be encouraged and indigenous peoples must genuinely participate in all decision-making regarding their lands and resources.

50. Chapter III, section B, dealt with the protection of the environment in periods of armed conflict. A number of legal instruments, especially Protocol I additional to the Geneva Conventions of 1949, dealt with the protection of the environment in wartime. The ecological consequences of the Iran-Iraq conflict, the Gulf conflict and the conflict in the former Yugoslavia could not yet be determined precisely, but had nevertheless fuelled questions about the content, limits, shortcomings and indeed effectiveness of international humanitarian law intended to protect the environment as such, together with persons and their property, against damage to the environment in the course of hostilities.

51. In that connection, the Director-General of the World Health Organization had filed in the Registry of the International Court of Justice a request for an advisory opinion on the question whether, in view of the health and environmental effects, the use of nuclear weapons by a State in war or other armed conflict would represent a breach of its obligations under international law, including the WHO Constitution. She believed that it would also be useful to ask the Court whether the manufacture, testing, possession and stockpiling of nuclear weapons and other weapons of mass destruction were lawful under international law.

52. In chapter IV, she examined the issue of environmental degradation and its impact on vulnerable groups. Paragraphs 119 to 126 dealt in particular with the issues of climate change, deforestation and wood-stripping, biological diversity, pollution, discharge of toxic and dangerous products and the transboundary transfer of hazardous wastes. Vulnerable groups, including women, children and young people and disabled persons, were the concern of paragraphs 137 to 153. In paragraph 154, she reiterated the concern she had previously expressed at the plight of persons displaced from their homes by adverse environmental conditions. As a minimum, such persons had the right to life, the right to health, food and shelter, and the right not to be sent to any location where their lives or security were endangered.

53. Chapter V contained an analysis of the effects of the environment on the enjoyment of fundamental rights. The list of such rights which she had specified in that chapter was not exhaustive, however.

54. Chapter VI contained her conclusions and recommendations. She had recommended, in particular, that the human rights bodies should examine, in the various fields of concern to them, the environmental dimension of the human rights under their responsibility. In order to avoid disparate practices and to promote the development of an overall, integrated and coordinated approach to the various phenomena, which would inevitably be dealt with in a sectoral way by the existing bodies, it was suggested that: a coordination centre should be set up to deal with the question within the United Nations Centre for Human Rights; a special rapporteur of the Commission on Human Rights should be appointed with a mandate similar to that generally given to special rapporteurs on thematic questions; and that a seminar should be held under the auspices of the Centre for Human Rights to help formulate practical recommendations on the way in which the right to a satisfactory environment could be rationally incorporated into the activities of human rights bodies.

55. In addition, she hoped that the draft declaration of principles on human rights and the environment, contained in annex I to the report, would help the United Nations to adopt, in the course of the current United Nations Decade of International Law, a set of standards consolidating the right to a satisfactory environment - defined as an integral part of the world partnership for peace, development and progress for all.

56. Dr. MERSON (Executive Director, Global Programme on AIDS, World Health Organization) said that people with HIV and AIDS faced continuing discrimination which added to their suffering. The AIDS pandemic could not be controlled without overcoming that discrimination and protecting the rights of those already infected or especially vulnerable to infection.

57. The statistics showed that the disease was spreading at an alarming rate, particularly in Africa and parts of Asia, and there could be no doubt that the world was facing a crisis. While progress was being made in some countries in preventing the disease, ground was being lost in other areas, where the confidentiality and human rights of infected individuals were not respected and where as a result people, fearing discrimination did not seek HIV tests and counselling and sex workers and drug users did not come forward for AIDS education, condoms and clean needles.

58. Discrimination against the minorities concerned thus made them even more vulnerable to infection. Women formed another group which was often particularly at risk, being often in a situation of economic and social dependence and thus unable either to refuse sex with a partner suspected of being infected, insist on safe sex or to leave a relationship. Their very right to life was thus often jeopardized.

59. It was important to bear in mind that HIV never remained confined within a high-risk group but always spread to the general population. Discrimination against the high-risk groups, which increased their vulnerability to AIDS, therefore also increased the risk faced by everyone else. Such discrimination also threatened general respect for human rights, since assaults on the rights of minorities could lead to much wider violations of rights and impair the well-being and stability of society.

60. Combating discrimination against HIV-infected people involved two major tasks. One was for States to ensure that AIDS-related laws and policies were non-discriminatory, protected those infected and provided redress for people whose rights had been violated. A legislative review was needed in most Government departments to correct anomalies. For example, in some countries the health ministry advocated the use of condoms to prevent HIV transmission, while the distribution of condoms in prisons was illegal, and the possession of condoms could be used as evidence against women accused of prostitution. Laws which criminalized homosexual activity undermined attempts to reach gay men with AIDS education, and law-enforcement measures could deter drug users from taking advantage of AIDS-prevention measures.

61. In addition to legislative measures, public education was needed to change the fundamental attitudes which prompted and tolerated discriminatory legislation and which were based on a belief that AIDS sufferers somehow "deserved" their plight. That would also involve giving people the

information they needed to avoid infection, and providing clear information on how the virus did not spread in order to overcome the irrational fear felt by many of coming into contact with HIV-infected people, which had caused great harm to sufferers.

62. Lastly, there was a need to impart values which enhanced solidarity and weakened the ancient human tendency to be intolerant of those who were in some way different.

63. The new United Nations Programme on HIV/AIDS, described in the Secretary-General's report (E/CN.4/Sub.2/1994/8), would emphasize the importance of respecting human rights and the development of a partnership between the public-health community and the human rights bodies, including the Sub-Commission. He suggested that the Sub-Commission should consider a number of specific proposals.

64. First of all, it was essential for the Sub-Commission to collect data on the extent of discriminatory practices. It might usefully investigate discrimination in separate areas under its own agenda items and within the mandates of its various working groups and special rapporteurs. For example, the eviction of HIV and AIDS sufferers from their homes could be tackled under the right to adequate housing (part of agenda item 8); travel restrictions on HIV sufferers could be dealt with under freedom of movement (item 19); arbitrary detentions of HIV sufferers could be dealt with by the Working Group on Detention, and the problem of pre-existing discrimination resulting in special vulnerability to infection could be incorporated into the Sub-Commission's existing work under agenda items relating to traditional practices affecting the health of women and children, contemporary forms of slavery, the prevention of discrimination and protection of children and women, and the protection of indigenous people and minorities.

65. The Sub-Commission should also clarify certain crucial theoretical issues, such as the degree to which States could be expected to protect individuals from discrimination by third parties, or the relationship between the duty to protect individuals from discrimination in enjoyment of their human rights per se and the wider obligation to ensure equality before the law.

66. Lastly, the Sub-Commission could provide valuable expert assistance with standard-setting issues. It would, for example, be helpful if it were to state clearly and unambiguously that discrimination in the enjoyment of rights on the grounds of HIV infection or suspicion of infection was prohibited by existing non-discrimination provisions and thus amounted to a violation of international standards.

67. In conclusion, he noted that discrimination against HIV sufferers - who would number 40 million by the year 2000 - and those close to them could not be considered a minor issue but one which was central to the concerns of the Sub-Commission. If discrimination against HIV and AIDS sufferers were not checked, the very concept of the universality of human rights would be lost and the rights of everyone in the community would ultimately be threatened.

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES:

(a) QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT;

(b) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY;

(c) INDIVIDUALIZATION OF PROSECUTION AND PENALTIES, AND REPERCUSSIONS OF VIOLATIONS OF HUMAN RIGHTS ON FAMILIES;

(d) THE RIGHT TO A FAIR TRIAL;

(e) INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS (agenda item 10) (E/CN.4/Sub.2/1994/23, 24, 25 and Add.1, 26, 42 and 44; E/CN.4/Sub.2/1994/NGO/6, 8, 10 and 25)

68. Mr. JOINET, introducing the preliminary report prepared by himself and Mr. Guissé on opposition to the impunity of perpetrators of human rights violations (economic, social and cultural rights) (E/CN.4/Sub.2/1994/11), said that it was the second part of an overall study on the question of impunity and would be followed by an interim report and then a final report in accordance with the established guidelines.

69. The subject matter of the preliminary report, which dealt with economic, social and cultural rights, was more difficult than that of the first part concerning civil and political rights, since less was known about them. While there had been numerous studies of economic, social and cultural rights, very few had been devoted to the question of combating their violation, largely because penal action, which was the cornerstone of the prevention of violation of civil and political rights, was not easily applicable in the field of those other rights.

70. The current report focused on two fundamental areas, as was reflected in its structure: the role of corruption in the violation of economic, social and cultural rights; and the role of intergovernmental financial institutions such as the IMF and the World Bank. Other important factors had not, however, been ignored.

71. With regard to the role of corruption, he and his co-author had reviewed previous deliberations on the subject within the United Nations system with a view to identifying some of the main obstacles to the fight against corruption and proposing some remedies. In 1989, the Interregional Seminar on Corruption in Government had concluded that impunity was the mainspring of corruption. In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders had concluded that corruption in government was universal, that its effects were particularly damaging to weaker economies, that corruption of public officials could undermine development programmes, and that sanctions should be directed at enterprises as well as at public officials. In 1992, the Commission on Human Rights had adopted resolution 1992/50 which, for the first time, addressed the issue of the restitution of diverted assets and drew attention to the blurred area in international law regarding the restitution of assets to the people to whom

they rightfully belonged. It also highlighted the responsibility of the developed countries as "corrupters" in encouraging fraudulent enrichment of officials in developing States.

72. In the light of those documents, the authors had taken the view that the fight against corruption was part of an overall fight for democracy rather than an end in itself. That was a crucial consideration, given that embargoes had sometimes engendered corruption in the form of black markets and organized crime, which infiltrated institutions and remained deeply embedded even after the embargoes had been lifted.

73. The principal obstacles to the fight against corruption had been identified as the following: first, the fact that corruption of foreign officials, was not, in most countries, subject to sanctions under criminal law; secondly, the extradition of persons found guilty of misappropriating public funds, was not permitted in most States, although it was not regarded as a political offence under international law; and thirdly and most importantly, there was as yet no international convention dealing specifically with the issue of corruption.

74. Without such a convention, there could never be any effective international cooperation in fighting corruption, and it was also needed to bring about a harmonization of national legislation and encourage States to complement existing penal provisions with measures under civil law (to make illicit contracts invalid), fiscal law (to counter the inevitable tax evasion associated with all illicit transactions) and internal administrative procedures to ensure better monitoring of the markets. Three draft instruments deserved consideration as a basis for a possible future convention: the draft international convention on the elimination of bribery in international commercial transactions prepared by the Economic and Social Council; a draft recommendation by OECD on the same subject; and the draft convention prepared by Mr. Paolo Bernasconi on the international corruption of public officials.

75. A fourth major obstacle was the virtual absence of any NGO involvement, in great contrast to the important role the NGOs had come to play in the area of human rights and the environment. Their involvement needed to be developed in order to counter political apathy, which was all too often the response of State authorities to corruption, and to mobilize public opinion. In addition, NGOs could also help in organizing and uniting the victims of corruption and shedding light on some of the mechanisms involved. They also had an important role in lobbying to create greater transparency in the markets.

76. Turning to the role of the international financial institutions such as the IMF and the World Bank, which was addressed in the second part of the report, he noted that there were two major schools of thought. According to one, the institutions had strayed from their original mandates and the only solution was root-and-branch reform. The other advocated more limited reforms in specific areas. The issue was a complex one and the approach adopted to date was to review the major comments on the subject made within the United Nations system with a view, at a later stage, to drawing conclusions and formulating some preliminary recommendations which could be developed in the final phase of the study.

77. The principal documents considered in the preliminary report and which would be the basis for further work were: the four reports produced by the Special Rapporteur on the realization of economic, social and cultural rights, which paid particular attention to the effect of the activities of international financial institutions; the working document produced by the Special Rapporteur on promoting the realization of the right to adequate housing; the preliminary report produced by the Special Rapporteurs on population transfers; the Report of the Secretary-General on forced evictions; the Report of the Working Group on the Right to Development; the reports of the Committee on Economic, Social and Cultural Rights; the report of the Committee on the Rights of the Child on its third session, which examined the effects of structural adjustment on the implementation of the Convention on the Rights of the Child; the UNDP Human Development Report 1992 and the report "Public Policy and Social Conditions" produced by UNICEF. Some of the salient points raised in those documents were summarized in paragraphs 27-43 of the preliminary report.

78. In the course of future work on the study, it would be appropriate to consider in greater detail the role of corruption in undermining economic, social and cultural rights and, in particular, to produce a working document, possibly on the basis of the Economic and Social Council draft international convention. It would also be appropriate to undertake a comparative study of national legislations and institutions directed towards combating corruption, and to develop ways of encouraging greater involvement by NGOs.

79. With regard to the reform of the international financial institutions, a start could be made by undertaking a legal study of the apportionment of responsibilities between the senior administrations of those institutions and their member States. Such a study would have the effect of "depoliticizing" the issue and shed light on some of the mechanisms involved. It would also be useful to consider the possibilities offered by the concept of "positive conditionality", which meant creating a more effective linkage between the provision of aid and the observance of human rights.

80. Another area which would require attention but had not been dealt with in detail in the preliminary report was the question of the relationship between embargoes and violations of economic, social and cultural rights. Such embargoes tended to create conditions in which the rich became richer at the expense of the poor, and in which organized crime could take root. It also appeared self-defeating to impose an embargo in the name of human rights which, in order to succeed, had to violate economic, social and cultural rights, as well as being incompatible with the concepts of interdependence and the indivisibility of rights.

81. Lastly, consideration would be given, in collaboration with the Economic and Social Council, to drafting an optional protocol to the International Covenant on Economic, Social and Cultural Rights to establish a committee to receive and consider communications. It might also be possible to consider developing legal sanctions for violations. With regard to the latter, he cited a recent case in which the Paris Court of Appeal had invoked the right to housing set out in the Covenant in ruling that a number of families whose repeated requests for public housing had been ignored had acted lawfully in occupying certain premises.

82. Mr. TREAT, Special Rapporteur on the right to a fair trial, introducing the final report on the subject which he had prepared jointly with Mr. Chernichenko, recalled that the study had first been initiated in 1989, at a time of intense rivalry between two nuclear super-Powers and the bitterness and hostility accompanying that rivalry had crept into the Sub-Commission's proceedings. The then United States Ambassador had been furious that he should have agreed to work in harmony with a citizen of the Soviet Union. That was just the beginning of many violations of the independence of a Sub-Commission member by a temporary political appointee. He thus warned the Sub-Commission against government representatives who announced their strong commitment to the independence of its members only to turn around and duplicitously violate that commitment.

83. The final report (E/CN.4/Sub.2/1994/24) summarized the work done between 1989 and 1993, examined the current status of the right to a fair trial and a remedy and recommended actions to strengthen that right. Annex I to the report contained a revised draft third optional protocol to the International Covenant on Civil and Political Rights, aimed at guaranteeing under all circumstances the right to a fair trial and a remedy. The draft optional protocol had been revised in the light of comments received.

84. Annex II, on the other hand, contained a draft body of principles on the right to a fair trial and a remedy. It derived from international interpretations of that right and from national laws and practices those common elements which might serve as an authoritative summary of principles rather than as an instrument which might be adopted by the Sub-Commission or other United Nations organ.

85. The report contained recommendations that should strengthen the right to a fair trial and a remedy. It recommended that, if domestic laws and procedures did not exist or were inadequate to comply with international standards, Governments should seek advisory services and technical assistance from the United Nations, other intergovernmental organizations and non-governmental organizations for the drafting of such laws and procedures. It also recommended that Governments should provide or facilitate the training of their judiciaries to ensure they were fully qualified to protect the right to a fair trial and a remedy.

86. Steps should be taken to comply with the Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers. Treaties containing provisions protecting the right to a fair trial and a remedy should be ratified. Notwithstanding those recommendations, however, there was still a need to strengthen existing mechanisms to monitor the implementation of the right. He and his co-author also recommended therefore that international monitoring of the right should continue through such bodies as the Human Rights Committee and the Working Group on Arbitrary Detention.

87. A number of members of the Sub-Commission seemed to think that the approval of a body of principles would be an appropriate step for the Sub-Commission and that the question of an optional protocol might be left to the Commission on Human Rights. The Human Rights Committee, which had reviewed the draft third optional protocol at its fiftieth session in

April 1994, had expressed concern, however, that the protocol might have the undesired and unexpected effect of diminishing the protection of detained persons during states of emergency in countries which did not ratify it. The Committee did not want to undermine its gradually developing jurisprudence on the non-derogability of the right to a remedy. It had also expressed its concern that it might not be feasible to expect that all provisions of article 14 of the Covenant could remain fully in force in any kind of emergency.

88. In the light of those comments, the Sub-Commission should consider how to strengthen the right to a fair trial and a remedy. It should accept the Committee's position that articles 2 and 9, paragraphs 3 and 4, were non-derogable and reaffirm that the provisions of those articles were inherent in the Covenant as a whole. Article 14 should also be described as non-derogable, because the right to a fair trial was already non-derogable under the Geneva Conventions and under two major regional systems. It might also wish to give the Commission on Human Rights an opportunity to consider the establishment of an open-ended working group to begin drafting a third optional protocol to the Covenant, which would clarify the right to a fair trial and a remedy, but expressly avoid undermining the developing approach of the Human Rights Committee to those Governments that did not accede to the protocol.

89. The authors of the report also recommended that the entire study should be put together in a single document and published in the United Nations Human Rights Study Series as a source of fair-trial norms and remedies, interpretations of those norms and recommendations on how to implement and protect the basic human right to a fair remedy. He and his co-author were prepared to compile the complete study without financial implications. The compilation would reflect the comments received from Governments, Sub-Commission members and others as well as the most recent developments at the time of publication.

90. He regretted that a political representative of the United States should have implied that the Sub-Commission should be demolished. Such misguided sentiments were not the views of the leading members of his Government, and those who expressed them brought dishonour upon his country. He dissociated himself from such reprehensible remarks.

91. Mr. HATANO said that, while the final report had enlightened him with regard to the conceptual relationship between objectivity and impartiality and between a fair trial and an objective trial, he was a little confused by the Special Rapporteurs' recommendations. They noted in paragraph 18 of the report that article 2, paragraph 3, and article 9, paragraphs 3 and 4, of the International Covenant on Civil and Political Rights embodied the essence of habeas corpus and amparo and should be made non-derogable. Then, in paragraph 165, they stated that the Sub-Commission should consider drafting a separate declaration on the right to habeas corpus, amparo and similar procedures. He wondered whether they wanted to have habeas corpus and amparo enshrined in a separate declaration or to have them embodied in the proposed third optional protocol.

92. While he had no particular preferences, the Sub-Commission should take all the factors into account before reaching a decision. It was true that a protocol, which was binding upon the States parties, would have a much stronger impact than a mere declaration. On the other hand, the protocol would have no effect at all on States which had not ratified it, whereas a declaration might have some moral, if not legal, impact on all States. According to the chart of ratifications of the international human rights instruments on 30 June 1994, the number of States parties to the International Covenant on Civil and Political Rights had reached 126, while the First Optional Protocol had been ratified by 78 States and the Second Optional Protocol by only 22. Moreover, the Sub-Commission should consider the wishes of the Human Rights Committee - the treaty body for the Covenant - which would be responsible for implementing the third optional protocol once it was adopted.

93. The study was a splendid piece of work which fully deserved publication by the United Nations and the widest possible dissemination.

The meeting rose at 6 p.m.